A

RECALIVA DESIGN STEEL (M) SDN BHD

v.

VISTA ACCESS SDN BHD & ANOR

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-65-2005-II]
6 MARCH 2008

C ***CIVIL PROCEDURE:*** *Pleadings - Facts not pleaded - Facts not pleaded in defence - Court not obliged to consider facts not reflected in pleadings - Evidence must relate to pleadings*

EVIDENCE: *Burden of proof - Shifting of burden in civil cases - Cases where evidence is given to show money has changed hands - Evidential burden falls* D *on defendants to show why they are not obliged to pay - Defendants cannot evade liability by simply saying "put to strict proof"*

EVIDENCE: *Documentary evidence - Tendering of documents - Contents of disputed documents must be proved according to law - Probative value of documents not proved according to law will remain zero - Admissibility of* E *exhibits which were never tendered/marked as exhibits - Document admissible where oral evidence given and content of document not denied*

The plaintiffs claimed that *vide* a memorandum of understanding, the plaintiffs had entered into a joint venture with the 1st defendant to F construct and complete an Islamic Centre in Indonesia based on the defendants' representation that the 1st defendant had been awarded the main contract for the same. As per the terms of MOU a sum of RM153,200 was paid to the defendants to be used for the participation in ground breaking ceremony of the said project, which was subject to G the condition that it was to be refunded, if the launching ceremony was not successful. An additional sum of RM100,000 was paid as an *interim* payment to be refunded upon securing funds under a bank guarantee subject to an agreement that the 2nd defendant was to personally guarantee the said sum and to underwrite and refund the said sum if the projects were not successfully launched. The plaintiff complained that H only a gathering was held at the site in Batam on 22 August 2003 for the project at Batam, and there was no further action taken by the defendants to acquire the project under the MOU. In consequence, the plaintiffs claimed that they were entitled to the refund of RM253,200 The defendants filed a defence and a counterclaim. The defendants I without demonstrating much of their case in the pleadings gave extensive evidence to create a version which was totally not pleaded. In respect of admissibility of exhibits, the defendants claimed that the said MOU

and the official receipt were never tendered/marked as exhibits and that therefore the said documents could not be relied on to substantiate the plaintiffs' claims.

Held (allowing the plaintiffs' claim):

(1) The version the defendants attempted to project to the court was never part of their defence. The court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. (para 6)

(2) The defendants cannot evade liability by simply saying 'put to strict proof'. (para 6)

(3) In cases where evidence is given to show money has changed hands, then the evidential burden falls on the defendants to show why they are not obliged to pay and put in their defence, *ie*, the version of the defendants case. This was not done in this case. (para 6)

(4) The contents of any disputed documents tendered cannot be deemed to have been proved unless it is proved according to law. This proposition will be within the spirit and intent of the Evidence Act 1950. The court can mark it as enclosures or exhibits or put any other label but the probative value will always remain zero. However, the facts in this case did not justify the court to entertain the complaint of the defendants as in this case oral evidence was given and the defendants in principle were not denying anything about the MOU and the receipt of the money. (paras 8 & 10)

Case(s) referred to:

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

Lim Ah Oh & Anor v. Rex [1950] 1 LNS 36 HC ***(refd)***

Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***

Victoria Insurance Co Ltd v. Aik Teong Trading Co [1972] 1 LNS 162 HC ***(refd)***

Yousufali v. State of Maharashtra AIR 1968 SC 147 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 60, 73A

For the plaintiffs - Satinder Singh Sandhu (Tay Choon Howe with him); M/s Sandhu & Co Advocates

For the defendants - Lina Wee; M/s Charles Ling Advocates

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' claim in the sum of RM253,200 with interest and costs on the grounds that the defendants have failed to honour a joint venture agreement pursuant to a memorandum of understanding (MOU) dated 11 July 2003.

At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Brief Facts

[2] The plaintiffs say (i) that by the MOU the plaintiffs have entered into a joint venture with the 1st defendant to construct and complete an Islamic Centre Al'Akbar Sinar Islam South East Asia in Pontianak, West Kalimantan, Indonesia based on the defendants' representation that the 1st defendant has been awarded the main contract for the same. (ii) as per the terms of MOU a sum of USD40,000 (RM153,200) was paid to the defendants to be used for the participation in ground breaking ceremony of the said project, which was subject to the condition that it is to be refunded, if the launching ceremony is not successful. (iii) further, an additional sum of RM100,000,00 was paid as an *interim* payment to be refunded upon securing funds under a bank guarantee subject to an agreement that the 2nd defendant is to personally guarantee the said sum and to underwrite and refund the said sum if the projects were not successfully launched. (iv) the plaintiffs complain that only a gathering was held at the site in Batam on 22 August 2003 for the project at Batam, and there was no further action taken by the defendants to acquire the project under the MOU. In consequence, the plaintiffs' say they are entitled to the refund of RM253,200.

[3] The defendants had filed a defence and a counterclaim. The defence and counterclaim reads as follows:

Defence of the 1st and 2nd Defendants

1. The 1st and 2nd Defendants have no knowledge of Paragraph 1 of the Statement of Claim.

2. Paragraphs 2 and 3 of the Statement of Claim are admitted.

3. Paragraphs 4, 5, 6 and 7 of the Statement of claim are not admitted and the Plaintiff is put to strict proof thereof.

4. Other than that a gathering was held at the site on 22nd August 2003, Paragraph 8 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

5. In the alternative, the Defendants shall say that the said project was officially and successfully launched in Batam, Indonesia on 22nd August 2003. The "gathering held at the site on 22nd August 2003" as alleged at Paragraph 8 of the Statement of Claim was the official launching of the said project.

6. The Defendants deny that the Plaintiff is entitled to the refund of the monies stated in Paragraph 9 of the Statement of Claim, and puts the Plaintiff to strict proof thereof, as the said project had been successfully launched officially on 22nd August 2003.

7. The Defendants deny Paragraphs 10 and 11 of the Statement of Claim and put the Plaintiff to strict proof thereof.

8. The Defendants shall say that the Plaintiffs' action was misconceived and that the Plaintiffs' suit herein has caused the Defendants to suffer loss and damages.

9. Save as hereinbefore specifically admitted, the Defendants deny each and every allegation contained in the Statement of Claim as if the same were set forth and traversed seriatim.

Counterlaim

10. The Defendants repeat Paragraphs 1 to 9 of the Defence.

11. The Defendants shall say that the Plaintiffs' action herein despite the official launching of the said project on 22nd August 2003 has caused the Defendants to suffer losses and incur damages.

12. And The Defendants Claim:

(a) Damages;

(b) Interests at the rate of 8% per annum from the date that the Honourable Court shall deem fit;

(c) Costs;

(d) And such further orders as the Honourable Court shall deem fit.

It must be noted here that the counterclaim was struck out by the order of the court pursuant to an interlocutory application, very much earlier. I will elaborate on this a little bit more in the later part of the judgment.

Preliminary Observation

[4] The defendants without demonstrating much of their case in the pleadings gave extensive evidence to create a version which was totally not pleaded, which I do not intend to set out, save as to show part of the submission of the defendants, to demonstrate the blatant breach of the rules of pleadings.

[5] That part of the submission reads as follows:

> The whole action arose from the construction of the Islamic Centre at Pontianak and Batam, Indonesia. The witness, DW-4, testified that he had been lobbying for the project for quite sometime from the Islamic Centre Al' Akbar Sinar Islam South East Asia (hereinafter called "YABANRI"). When DW-4 had information that the Project was available, he realised he could not handle such a big project. He called DW-2. When DW-2 was discussing the project with DW-4, he was overheard by a mutual friend of DW-2 and PW-1, Colonel Saujana Bin Bujang. This friend called PW-1, and PW-1 and his co-director in the Plaintiff, DW-1, met DW-2 in Singapore. Then DW-1 called DW-3, an international consultant, as there was an arrangement between DW-3 and the Plaintiff (ie, DW-1 and PW-1) to source for projects in South East Asia, which projects if DW-3 could secure financial support from his group of international financiers, would where possible, be undertaken by the Plaintiff. The group consisting of DW-1, DW-2 and DW-3 flew to Jakarta where they met up with PW-1. They then had a meeting with YABANRI. Around July of 2003, YABANRI decided to have a ground breaking ceremony for the project at Batam, Indonesia. YABANRI sought financial contributions from potential contractors interested in undertaking the project. One of these potential contributors was the 1st Defendant. From the 1st Defendant, YABANRI asked for USD40,000.00. From that, the MOU dated 11th July 2003 came into existence. After the group attended the launching ceremony on 22nd August 2003, they were informed that YABANRI asked an additional RM100,000.00 from the group as the launching ceremony had over-extended the budget of YABANRI. In essence, this is a straightforward case of contract, even though the Defendants had to call witnesses from overseas to support their defence. The subject matter of the contract was in Batam, Indonesia. The parties involved in the action are a combination of Malaysians, Australians and Indonesians.

[6] After having heard the evidence of the defendants, it is crystal clear to me that the version defendants attempted to project to me was never part of their defence. In such circumstances, the court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. The court is not concerned what issues the parties have framed for the determination of the court, when such issues cannot be reflective of the issues to be dealt with pursuant to the pleadings. It is totally abhorrent to notions of justice and fair play in a case where there is no dispute as to payment of money and receipt thereof by the defendants; to allow the defendants to give a version why he should not refund the said money when the defendants' version in evidence is not pleaded in the defence and/or intelligently pleaded in the defence. The defendants cannot evade liability by simply saying put to 'strict proof'. In such cases where evidence is given to show money has changed hands, then the evidential burden falls on the defendants to show why they are not obliged to pay and put in their defence, ie, the version of the defendants case. This was not done in this case. The defence in this case was so badly pleaded by pure denial that it was no surprise that the counterclaim was struck out by the court very much earlier. Pure denial and then seeking a counterclaim which shows on the face of it no *nexus* to the plaintiffs' claim or a claim other than the one related to the plaintiffs' claim is a good example of circuitous logic as in this case and in truth is void of merits. Further, such defences are bound to collapse at full trial if the defendants do not just stick to 'strict proof' but attempts to put a version which is not pleaded. Support for my proposition is found in a number of authorities but in my view nothing was stated as eloquently as done by Gopal Sri Ram JCA in the case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357:

> Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty - whether in contract or tort - may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct. So, in *Regina Fur Co Ltd v. Bossom* [1958] 2 Lloyd's Rep. 425, 428, Lord Evershed MR said:
>
> > I think that a defendant - whether he is an underwriter or any other kind of defendant - is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. Where such is the defence, the onus remains throughout upon the Plaintiffs' to establish the case they are alleging. Where such is the form of the pleading, it is not only not obligatory upon the defendants but it is not even permissible for them to

> proceed to put forward some affirmative case which they have not pleaded or alleged; and it is not, therefore, right that they should, by cross-examination of the Plaintiffs' or otherwise, suggest such an affirmative case. The defendants are acting correctly if they follow the course adopted in this case - that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the Plaintiffs' seek to make good.
>
> The result, where such is the form of the defence and of the issues raised, is no doubt such that the Judges will watch carefully that defendants, first, do not attempt, by evidence or cross-examination, to establish some affirmative case of which no proper notice has been given by way of pleading to the other side; and second, do not attempt to lead evidence solely directed to the credit of witnesses.

Law On Exhibits

[7] The defendants in respect of admissibility of exhibits complain and submit as follows:

> The documents, particularly the said MOU dated 11th July 2003 and the Official Receipt dated 10th September 2003 were never tendered/ marked as exhibits. Therefore the said documents which were crucial to the Plaintiffs" claim could not be relied on to substantiate the Plaintiffs" claims. See *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor.* [1997] 4 CLJ 509 and *Jong Ka Hiap & Ors v. Yong Soi Fah* (Suit No. KG 258 of 1987), where Richard Malanjum JC (as his Lordship was then) held that the document was not properly admitted as so could not be relied on. See s. 73A of Evidence Act 1950.
>
> In *Yap Choo Hoo v. Tahir Bin Yasin & Anor* [1970] 2 MLJ 138, Sharma J held:
>
> > I have up to now, perhaps in ignorance, thought that the sole object of preparing an agreed bundle of documents was that such a bundle was prepared under a practice note for the convenience of the court and parties. Such a practice note, however, could not override the provisions of the Evidence Ordinance. … .
> >
> > Both the bundles (of Agreed and Disputed Documents) are made for the convenience of the court and the parties to facilitate a speedy trial. … My own view is that a document even forming part of the agreed bundle of documents has got to be proved, although it need not be formally and strictly proved.
>
> In *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377, Shankar J held that:
>
> > a document does not become admissible in evidence merely because it has been handed to the adjudicating office and

marked as exhibit a document cannot be admitted intio evidence and marked as such until it has been properly proved.

However, mindful that the Honourable Court may opined otherwise, we humbly submit that the Plaintiffs' claims were not sustainable in that the Defendants had fully discharged what was intended under the contract, that is, the monies forwarded to the Defendants, even though by a third party, And Not The Plaintiff, was fully utilised towards the successful Ground Breaking Ceremony of the project by YABANRI.

[8] It is often said that you cannot mark an exhibit until and unless it is proved according to law. In my view, that is not a rule or procedure which is found in the Evidence Act. The right proposition of the law must be that the contents of any disputed documents tendered cannot be deemed to have been proved unless it is proved according to law. This proposition will be within the spirit and intent of Evidence Act 1950 (EA 1950). The court can mark it as enclosures or exhibits or put any other label but the probative value will always remain zero. I have in the last one year as judicial commissioner dealt with or in the process of dealing with 50 to 100 civil trials or so but I hardly found any, in any case, litigants filing documents according to rules of procedure. It is often the case that the litigants are producing part of the documents which they are relying at the date of trial, surprising every one including the judge. What can the court do? Reject it and suffer appellate scrutiny or allow them to file the same taking into consideration most of the cases are old cases, pending hearing for the last six or seven years or more. In such circumstances, I have always taken the view the prudent approach is to allow the litigant to file the documents upon consensus and as far as possible proceed with the trial but be very strict in accepting the truth of the contents of documents if it is not proved according to law. The justification to mark the document as exhibit (though there is not statutory prohibition to do so) may be justified within the concept of real evidence. The learned author *Sarkar on Evidence* (14th edn) vol. 1 defines it as:

Again evidence is either real or personal. By real evidence is meant evidence of which, any object belonging to the class of things, is the source, person also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either immediate, where the thing comes under the cognizance of our senses : or reported, where its existence is related to us by others. Personal evidence is that which is afforded by a human agent, either in the way of discourse or by voluntary signs. Evidence supplied by observation of involuntary changes of countenance and deportment comes under the head of real evidence.

It must be emphasized when a document is marked as exhibit as real evidence on the grounds it is in possession of the parties, you cannot rely on the contents, until and unless the content is proved according to law. This distinction must always be kept in mind.

Under this concept, court may allow a document to be marked which is in the possession of the parties but give no weight or value to its contents. The methodology of enclosures and exhibits are procedural devices widely in practice in courts. Such procedural methodology is nowhere found in any statutes. As long as there is no prejudice to any parties or is not in breach of evidential rules at the end of the case the court has some discretion to admit the documents but reject its contents if not proved accordingly to law. Support for what I have said can be found in piece meal basis in a number of cases. In *Victoria Insurance Co. Ltd. v. Aik Teong Trading Co.* [1972] 1 LNS 162 Chan Mit Tat J (as His Lordship then was) was of the view that s. 60 of the EA 1950 requires all evidence to be direct evidence. On the facts the document was admissible only to prove its existence and receipt but was inadmissible as hearsay evidence when the object was to establish the truth of what was in that statement.

It must be asserted here that document may be hearsay but oral evidence may be given without breaching the best evidence rule. Section 60 of EA 1950 states:

> (1) Oral evidence shall in all cases whatever be direct, that is to say:
>
> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> (b) if it refers to a fact which could be heard; it must be the evidence of a witness who says he heard it;
>
> (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.
>
> (2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

Section 60 EA 1950 reflects the best evidence rule in respect of oral evidence. The word 'direct' will mean original evidence ie, the evidence of one who has personal knowledge as opposed to second hand information or hearsay evidence. Under this section oral evidence must be direct ie, the testimony must be of the person who perceived the fact through the medium of his own senses. This section emphasises that evidence should always be direct because direct evidence is the best evidence. Hearsay evidence under this section must be rejected. Hearsay evidence is mainly rejected for the following reasons namely: (a) it is not the best evidence; (b) it is not made on oath; (c) it cannot be tested by cross-examination; (d) the court has no opportunity for watching the demeanor of the person making the statement; (e) admission of hearsay evidence will allow the opportunity for commission of fraud; (f) there is a depreciation of truth in the process of repetition; (g) the court may have to waste its time in listening to idle gossip or rumour. However there are number of exceptions to hearsay rule (see ss. 17 to 39 and 73A EA 1950). If the rules permit the admissibility of hearsay evidence, it is based on the grounds of necessity rather than precision. The probative value of such evidence must be very much less as opposed to direct evidence. (see *Lim Ah Oh & Anor v. Rex* [1950] 1 LNS 36). In *Yousufali v. State of Maharashtra* AIR 1968 SC 147 the Supreme Court of India has held that contemporaneous photographs of the relevant incident are held to be admissible. However the accuracy of such photographs must be proved by calling the photographer or any other person who has direct knowledge of its accuracy. In *Mohd. Nazari bin Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601 Augustine Paul JC (as he then was) has dealt with the relevant issues extensively in an articulate manner and in crux His Lordship's view as I understand is that a document can be admitted under any label but if the party wants to rely on the truth of its contents when it is disputed by the other party, it needs to be proved according to law. His Lordship himself admits that there is much controversy in the procedure in relation to agreed bundles and disputed bundles etc. I take the view these controversies have been created by the court themselves when the law of evidence is clear if the contents is disputed it must be proved according to law and justice is not concerned with what label is given

to the documents ie, agreed bundles or non-agreed bundles, exhibits, enclosures, etc;. It is as simple as that and nothing more. The learned judge of the apex court opined:

> An agreed bundle of document in a civil action is a useful tool in expediting the hearing process. Parties may agree to the inclusion of documents in such a bundle with or without conditions. The evidentiary value of a document in an agreed bundle of documents would therefore depend on the condition subject to which it was included in the bundle. In this regard I refer to *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ in delivering the majority judgment of the Federal Court said at p. 521:
>
> > It goes without saying that either or any of the parties to any particular civil case can effectively object to the inclusion of any document in an agreed bundle of documents, and further he is at liberty to impose conditions upon which any particular document is included therein, if he agrees in the first place to such inclusion.
>
> **In the absence of any express conditions regarding the inclusion of any of the documents in the agreed bundle of documents**, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.
>
> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.
>
> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.
>
> Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including

any "written hearsay" contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

On the effect of a document in an agreed bundle of documents where formal proof of its execution has been dispensed with useful reference may be made to *Lionel Edwards Ltd v. State of West Bengal* AIR 1967 Cal. 191 where AK Das J said at p 194:

> Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or other wise. In respect of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by way of cross-examination or otherwise. In this connection our attention was drawn to a case reported in AIR 1954 Bom 305, *Madholal Sindhu v. Asian Assurance Co Ltd.*, where Bhagawati, J. pointed out that where the correctness of the contents of a document produced in Court is in issue that should be proved by calling the executor of the document as a witness. The learned Judge pointed out that the issue before him was not whether the documents were written by X and that if that had been the only issue, the proof of the signatures, or the handwriting could have been enough. What was in issue however before the learned Judge was apart from X having signed or written the documents, whether the contents of the documents were correct. That could not be proved by a witness who had no personal knowledge whatever about the contents. The view propounded here is not in conflict with the view I have taken in the case before us. The contents become evidence on being marked on admission, formal proof being dispensed with, whatever might be their evidentiary value and the evidentiary value has to be judged in the light of other evidence and circumstances.

It is therefore clear that where a document is admitted with formal proof being dispensed with the party agreeing to its admission does not thereby accept the truth of the contents. He is entitled to challenge the contents of the document by way of cross-examination or otherwise. I must make it clear that the cross-examination that I have just referred to is cross-examination of other witnesses and not the maker of the document. It cannot refer to the maker of the document as formal proof of the document has been dispensed with which means that he need not be made available for cross-examination. If he is required to be produced for cross-examination then the object of dispensing with formal proof of the document will be defeated. If cross-examination of the maker is required in order to establish the

truth of the contents of the document then the party requiring such cross-examination ought not to have agreed to dispense with formal proof. Where he agrees to dispense with formal proof the other party is not obliged to produce the maker for cross-examination. In that event the evidentiary value of the document is determined by cross-examination of other witnesses produced by either party or by calling other witnesses on the issue concerned and the circumstances of the case. The reservation of a right to cross-examine when there is agreement to dispence with formal proof of a document is therefore superfluous as it is implicit in such an agreement. In the light of what I have said thus far the dispensation of formal proof of the police report with a right to cross-examination in this case can only refer to cross-examination of other witnesses called by the parties for the purpose of challenging the truth of the contents of the report. The sequence of events in this case reveals that the Defendants closed their case without calling any evidence. They have therefore deprived themselves of the opportunity of challenging the truth of the contents of the police report. Furthermore, by agreeing to the inclusion of the police report in the agreed bundle of documents they have thereby effectively prevented the Plaintiff from calling the maker of the report to tender it in evidence which he is entitled to do so.

[9] If parties want to avoid admission "of documents at trial stage, it will be prudent for them to obtain unless orders" at the case management stage, failing which the court may exercise its discretion to admit the document, subject to the contents being proved according to law.

[10] Having said all that, the facts in this case does not justify to entertain the complaint of the defendants as in this case oral evidence was given and the defendants in principle are not denying anything about the MOU and the receipt of the money.

Evidence

[11] In this case PW1, Saidi bin Abang Samsudin gave evidence to say the followings:

[1] The Plaintiff is part of the Jepak Group of Companies which also includes Jepak Holdings Sdn. Bhd.;

[2] PW1 is both a director and shareholder of both the Plaintiff and Jepak Holdings Sdn. Bhd.;

[3] The 2nd Defendant represented to PW1 that the 1st Defendant had been awarded the Main Contract for the construction of an Islamic Centre at Pontianak, West Kalimantan, Indonesia to induce the Plaintiff to participate in a joint venture to construct and complete the Islamic Centre;

[4] The main purpose of the Memorandum of Understanding dated 11.07.2003 was for the 1st Defendant to acquire the project at Pontianak, West Kalimantan from the project owner and liaise with local authorities and obtain the necessary approvals and permits required by the local government and non-government bodies, while the Plaintiff was to utilise its expertise to successfully complete construction of the said project;

[5] The Plaintiff paid USD$40,000.00 to the 1st Defendant for it to successfully acquire the project at Pontianak, West Kalimantan from the project owner and have a ground breaking ceremony for it. If the same was not successful, the sum of USD$40,000.00 will be refunded by the 2nd Defendant to the Plaintiff;

[6] The payment of USD$40,000.00 was made by the Plaintiff through Jepak Holdings Sdn. Bhd.;

[7] To relate the background information relating to the need, and the 1st Defendant's failure, to obtain a bank guarantee from the project owner for purposes of the project;

[8] The 2nd Defendant requested from the Plaintiff additional funds of RM100,000.00 as *interim* payment to the 1st Defendant until the issuance of a bank guarantee to the 1st Defendant and the 2nd Defendant would refund the same if the bank guarantee was not issued by 30.09.2003;

[9] The Plaintiff paid the additional sum of RM100,000.00 through Jepak Holdings Sdn. Bhd. As requested by the 2nd Defendant which was accepted by the 2nd Defendant without any protest;

[10] The background information relating to the engagement of Edward Moal Juga as the common solicitor for the parties and the instructions in relation to the payment of the RM100,000.00 and the preparation of the Official Receipt dated 10.09.2003;

[11] PW1 attended the 22.08.2003 gathering and noticed that the project had been awarded to another company, ADHY KARYA and not the 1st Defendant;

[12] What transpired during and after the 22.08.2005 gathering, in particular nothing was done by the 1st Defendant to secure and commence the construction of the project;

[13] Despite the fact that ADHY KARYA had been awarded the contract, the 2nd Defendant asked PW1 not to worry as the 2nd Defendant represented to PW1 that the bank guarantee had been obtained but when PW1 asked to view the bank guarantee, the Defendants were not able to produce the original copy;

A [14] The Plaintiff has made repeated demands to the Defendants for the refund of the total sum of RM253,200.00 but no refund of the sum has been made to date.

[12] Very importantly the solicitor, PW2 Edward Moal Juga who prepared the MOU said the following:

B [1] PW2 was the common solicitor for the Plaintiff and Defendants in the transactions/dealing in respect of the joint venture to construct the Islamic Centre;

[2] PW2's role as the common solicitor;

C [3] In respect of the Official Receipt dated 10.09.2003, it was prepared by PW2 pursuant to the joint instructions of Saidi Bin Abang Samsudin and Yong Kar Chuing;

[4] Further, the Official Receipt dated 10.09.2003 was in respect of the payment by the Plaintiff of RM100,000.00 being an *interim* D payment to the 1st Defendant until the issuance of a bank guarantee to the 1st Defendant and the 2nd Defendant would refund the same is the bank guarantee was not issued by 30.09.2003.

E [5] PW2 met Yong Kar Chuing in person to hand over a cheque of RM100,000.00 and to get the latter to sign the Official Receipt dated 10.09.2003;

[6] Yong Kar Chuing signed the Official Receipt before PW2 and PW2 attested the same by signing and affixing his personal F stamp;

[7] Yong signed after he has read and was satisfied with the Official Receipt; Yong did not indicate to PW2 that the former has difficulty understand the content of the Official Receipt and did not ask PW2 to explain.

G **[13]** I have heard the evidence, submission of parties in detail. I take the view the plaintiffs' claim must be allowed. My reasons and findings are as follows:

(i) The plaintiffs have paid the sum as claimed. This matter in H substance is not in dispute.

(ii) The claim by the plaintiffs that nothing was done by the 1st defendant to secure and commence the construction of the project, has merits when contrasted with a defence mainly on bare denials and strict proof.

I

(iii) The plaintiffs also had at the commencement of trial amended the statement of claim to add a prayer "alternatively such liquidated sum as found due and owing". A

[14] For reasons stated above, I allow the plaintiffs' claim with the following orders: B

(i) The 1st defendant to pay the plaintiff the sum of RM153,200 with interest at 8% per annum from the date of filing until the date of realisation.

(ii) The defendants to pay the plaintiffs the sum of RM100,000 with interest at 8% per annum from the date of filing until the date of realisation. C

(iii) The defendants to pay the costs to the plaintiffs. The getting up fees shall not exceed RM30,000. If costs cannot be agreed, the plaintiffs are at liberty to tax the costs. D

I hereby order so.

E

F

G

H

I